


# ***CR 2012/92 - Income tax: ANZ Share Option Plan***

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## Class Ruling

### Income tax: ANZ Share Option Plan

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#### **📌 This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

### Relevant provision(s)

2. The relevant provisions dealt with in this Ruling are:

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- Subdivision 83A-C of the ITAA 1997
- section 83A-120 of the ITAA 1997
- section 83A-330 of the ITAA 1997
- section 83A-340 of the ITAA 1997
- section 280-100 of Schedule 1 to the *Taxation Administration Act 1953* (TAA)
- section 280-160 of Schedule 1 to the TAA; and
- Subdivision 284-B of Schedule 1 to the TAA

All subsequent legislative references in this Ruling are to the ITAA 1997 unless otherwise indicated.

## Class of entities

3. The class of entities to which this Ruling applies is employees of Australia and New Zealand Banking Group Limited (ANZ) or its subsidiaries (ANZ Group) who:

- acquire an award of options under the ANZ Share Option Plan (the Plan) pursuant to which each option granted (Right) is a right to acquire one fully paid ordinary share in ANZ (ANZ share) or, at the discretion of the Board, to receive a cash payment in lieu of an ANZ share; and
- are residents of Australia within the meaning of that expression in subsection 6(1) of the *Income Tax Assessment Act 1936*.

In this Ruling, a person belonging to this class of entities is referred to as a participant.

## Qualifications

4. The Commissioner makes this Ruling based on the precise arrangement identified in this Ruling.

5. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 9 to 19 of this Ruling.

6. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## Date of effect

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8. This Ruling applies from 1 July 2012. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## Scheme

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9. The following description of the scheme is based on information provided by the applicant. The following documents, or relevant parts of them form part of and are to be read with the description:

- class ruling application dated 12 August 2012;
- draft ANZ Share Option Plan Rules (the Rules); and
- draft document titled ANZ Equity Grants – Conditions of Grant.

**Note:** certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

10. ANZ operates the Plan as part of its short and long term reward and retention strategy. The Plan is governed by the Rules.

11. Rights under the Plan are awarded for no consideration.

12. A Right awarded to a participant under the Plan is a right to acquire an ANZ share for no consideration or, at the discretion of the Board, a cash payment in lieu thereof, subject to the participant's continued employment with the ANZ Group (Service Condition) and, where applicable, a performance condition as described in the Rules (Performance Condition).

13. The Board may determine at any time prior to vesting of a Right to satisfy the Right with a cash payment.

14. The Service Condition requires the participant to remain employed with the ANZ Group for a minimum of 12 months. When a Performance Condition applies, the Board will determine that an appropriate performance metric will apply.

15. Upon satisfaction of the Service Condition and the Performance Condition (where applicable), the Rights will vest.

16. Upon exercise a participant will be allocated one ANZ share for each Right or, if the Board so determines, a cash payment in lieu of an allocation of an ANZ share.

17. A participant will retain their Rights if the participant ceases employment prior to vesting due to death, total and permanent disablement, retrenchment or separation. If a participant ceases employment for any other reason, their Rights will lapse unless the Board determines otherwise. The Board's discretion to determine otherwise will not be exercised on a routine basis.

18. Immediately after acquisition of the Rights, none of the participants will hold a beneficial interest in more than 5% of the shares in ANZ and are not in a position to cast or control the casting of more than 5% of the votes that may be cast at a general meeting of ANZ.

19. The predominant business of ANZ is not the acquisition, sale or holding of shares, securities or other investments (whether directly or indirectly through one or more companies, partnerships or trusts).

## Ruling

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### Where Rights are settled with shares

20. Rights acquired under the Plan are indeterminate rights for the purposes of section 83A-340. If the Board does not exercise its discretion to satisfy the Rights with a cash payment, the indeterminate rights will be treated as rights to acquire a beneficial interest in ANZ shares from the time the Rights were acquired by the participants. The rights to acquire a beneficial interest in shares are ESS interests acquired under an employee share scheme.

### Subdivision 83A-C

21. Rights acquired by participants under the Plan are at real risk of forfeiture and where section 83A-340 applies to the Rights, Subdivision 83A-C also applies to the Rights.

22. The discount in relation to the ESS interest will be assessable at the earliest ESS deferred taxing point determined under section 83A-120.

23. In accordance with section 83A-110, the amount to be included in assessable income in the income year in which the ESS deferred taxing point occurs will be the market value of the ESS interest at the ESS deferred taxing point reduced by the cost base of the ESS interest.

### Where Rights are satisfied in cash

24. Where a participant's Rights are satisfied in cash, including where a participant has ceased employment (within the meaning of section 83A-330), the cash payment will be included in the assessable income of the participant in the year in which it is received under section 6-5.

**Shortfall penalty and shortfall interest charge**

25. Where a participant's assessment of an earlier income year is amended to include an amount in relation to the Rights, no shortfall penalty will be imposed pursuant to Subdivision 284-B of Schedule 1 to the TAA.

26. Where a participant's assessment of an earlier income year is amended to include an amount in relation to the Rights, a shortfall interest charge (SIC) on the additional amount of tax that becomes payable will be imposed pursuant to section 280-100 of Schedule 1 to the TAA. However, the participant may request that the Commissioner exercise his discretion under section 280-160 of Schedule 1 to the TAA and remit the SIC in full or in part.

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**Commissioner of Taxation**17 October 2012

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## Appendix 1 – Explanation

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❶ *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### Where Rights are settled with shares

#### **ESS interests**

27. For the purposes of Division 83A, an ESS interest in a company is defined under subsection 83A-10(1) as either a beneficial interest in a share in the company or a beneficial interest in a right to acquire a beneficial interest in a share in the company.

28. Under the Plan, participants are granted Rights to acquire ANZ shares for no consideration, subject to a Service Condition and, where applicable, a Performance Condition. Upon satisfaction of these condition(s), the Rights will vest.

29. However, the Board retains a discretion to determine that the participant's entitlement at any time before vesting will be satisfied with a cash payment in lieu of ANZ shares. For as long as the Board retains the discretion, the Right will not yet be a right to acquire a beneficial interest in an ANZ share.

#### **Indeterminate rights**

30. Section 83A-340 provides that where an employee acquires a beneficial interest in a right that later becomes a right to acquire a beneficial interest in a share, Division 83A will apply as if the right had always been a right to acquire the beneficial interest in the share.

31. In order for section 83A-340 to apply, the right must be capable of becoming a right to acquire a beneficial interest in a share and in fact become such a right.

32. Section 83A-340 provides examples of such rights which illustrate that a right to acquire a share with a specified value, or a right to an ESS interest or cash at the provider's discretion, are rights capable of becoming rights to acquire a beneficial interest in shares. Therefore, if the Board does not exercise its discretion to satisfy the rights with cash, section 83A-340 will apply to the Rights. Division 83A will then apply to the Rights as if the Rights had always been a right to acquire a beneficial interest in ANZ shares.

33. The Rights will be ESS interests acquired under an employee share scheme under section 83A-10 as the Rights are granted to a participant in relation to their employment as an employee of a company in the ANZ Group.

34. As the Rights are awarded to employees for no consideration under the Plan, the Rights will be acquired at a discount.

**Subdivision 83A-C*****Real risk of forfeiture***

35. Subsection 83A-25(1) in Subdivision 83A-B requires that assessable income for the income year in which the ESS interest is acquired includes the discount in relation to the interest. However, Subdivision 83A-B will not apply if Subdivision 83A-C applies.

36. Subdivision 83A-C provides that where certain conditions are satisfied, the discount in relation to a beneficial interest in a right to acquire a beneficial interest in a share is not included in an employee's assessable income when they acquire the interest. Instead, under section 83A-110 the assessable income of the employee will include at a later time (the 'ESS deferred taxing point') the market value of the interest at the ESS deferred taxing point reduced by the cost base of the interest. The conditions to be satisfied for the interest to be eligible for an ESS deferred taxing point are listed at subsection 83A-105(1).

37. The first condition is that Subdivision 83A-B would, but for section 83A-105, have applied to the interest.

38. The second condition is that the interest be an interest in the company that employed the employee, or the holding company of that company.

39. The third condition is that all interests available under the employee share scheme must relate to ordinary shares.

40. The fourth condition is that:

- the predominant business of the company in which the interests are acquired is not the acquisition, sale or holding of shares, securities or other investments (directly or indirectly); or if it is
- the employee is not employed by that company and also a subsidiary of that company or a holding company of that company, or a subsidiary of the holding company.

41. The fifth condition is that immediately after the interest is acquired the employee will not hold a beneficial interest in greater than 5% of the shares, or be in a position to control the casting of greater than 5% of the votes that might be cast at a general meeting of the company.

42. The Commissioner accepts for the purposes of Subdivision 83A-C, that in relation to Rights acquired by a participant under the Plan, the first five conditions have been satisfied.

43. The sixth and final condition that must be satisfied is that there must be a real risk, under the scheme rules, that the participant

- will forfeit or lose the interest (other than by disposing of it, exercising the right or letting the right lapse); or

- if the right is exercised, the participant will forfeit or lose the beneficial interest in the share (other than by disposing of it).

44. In order for the 'real risk of forfeiture' test to be satisfied, in relation to an ESS interest acquired by an employee under an employee share scheme, a reasonable person must consider that there is an actual possibility of forfeiture. Furthermore the risk of forfeiture must be 'real', not nominal, artificial or contrived. There must be more than a mere possibility.

45. 'Real risk of forfeiture' in a scheme may include conditions where retention of the ESS interests is subject to performance hurdles or a minimum term of employment. In cases where an employee share scheme has both employment and performance conditions to be met, and one of these conditions satisfies the 'real risk of forfeiture' test, it is not necessary to consider whether the other condition also satisfies the test.

46. Where there is some doubt whether a condition will satisfy the 'real risk of forfeiture' test then the other condition will also be examined.

47. Rights granted to participants under the Plan will vest in accordance with the Rules, but in any event, at least 12 months from their grant date. Unvested Rights may be forfeited if the participant ceases employment with the ANZ Group during the vesting period. Rights can only vest and be exercised if the Service Condition and, where applicable, a Performance Condition, have been achieved by the vesting date. The Rights will lapse to the extent that the Service Condition and any applicable Performance Condition are not achieved.

48. As the minimum employment period before vesting is at least 12 months from the grant date, then subject to the discussion below regarding the discretion of the Board, the Commissioner accepts that the 'real risk of forfeiture' test is met for Rights granted under the Plan.

49. In circumstances where a participant ceases employment for reasons other than death, total and permanent disablement, retrenchment or separation and the Board exercises its discretion to allow participants to retain their unvested Rights, the Commissioner does not consider that the availability of discretion in such circumstances will prevent the Rights from being at real risk of forfeiture where such discretion is not routinely exercised.

50. Therefore, as there is a real risk that a participant will forfeit or lose their Rights, other than by disposing of them, the sixth condition is satisfied. Subsection 83A-105(3) will apply to the Rights acquired by a participant under the Plan.

51. As a result, Subdivision 83A-C applies to the Rights, and Subdivision 83A-B does not apply. The taxation of Rights received under the Plan will be deferred until an ESS deferred taxing point occurs.

***ESS deferred taxing point***

52. As Subdivision 83A-C applies to the Rights granted under the Plan, section 83A-120 will apply in determining the ESS deferred taxing point.

53. Section 83A-120 provides that the ESS deferred taxing point for rights to acquire shares occurs at the earliest of the following times:

- when the right has not been exercised, there is no real risk of forfeiting the right, and the scheme no longer genuinely restricts disposal of the right (subsection 83A-120(4));
- when the participant ceases the employment in respect of which they acquired the rights within the meaning of section 83A-330 (subsection 83A-120(5));
- seven years after the participant acquired the rights (subsection 83A-120(6)); and
- when there is no real risk of forfeiting the right or underlying share, and the scheme no longer genuinely restricts exercise of the right or disposal of the resulting share (subsection 83A-120(7)).

54. However, if the participant disposes of the rights (or the shares acquired on exercise of the Rights) within 30 days of the time which would otherwise be the ESS deferred taxing point, the ESS deferred taxing point will instead be the time of disposal (subsection 83A-120(3)).

***Amount included in assessable income***

55. In accordance with section 83A-110, the amount to be included in assessable income in the income year in which the ESS deferred taxing point occurs will be the market value of the ESS interest at the ESS deferred taxing point reduced by the cost base of the ESS interest.

***Participant ceasing employment***

56. Where a participant ceases employment (within the meaning of that term in section 83A-330) with the ANZ Group prior to the vesting date and retains their Rights which are subsequently settled in ANZ shares, the participant will include the discount on their Rights in their assessable income for the year in which they ceased employment, subject to the 30 day rule in subsection 83A-120(3).

57. Where the date of cessation of employment occurs in an income tax year prior to the year in which the rights vest, the employee may need to lodge an amended income tax return to include an amount under subsection 83A-110(1) in their assessable income.

### ***Where Rights are satisfied in cash***

58. Where a participant's Rights are satisfied in cash upon exercise, including where a participant ceases employment (within the meaning of section 83A-330) as a good leaver or otherwise, section 83A-340 will not apply to the Rights. The Rights will not be considered an ESS interest under subsection 83A-10(1) and Division 83A will not apply to the Rights.

59. Where a participant's Rights are ultimately satisfied in cash instead of ANZ Shares, the granting of the Rights:

- will be viewed as one of a series of steps in the payment of salary or wages; and
- will not be viewed as a separate benefit to the payment of salary or wages which are excluded from the definition of fringe benefit by paragraph 136(1)(f) of the *Fringe Benefits Tax Assessment Act 1986*.

60. Subsection 6-5(2) provides that the assessable income of an Australian resident taxpayer includes ordinary income derived directly or indirectly from all sources during the income year. Ordinary income includes salary and wages.

61. Therefore, the participant will need to include the cash payment in their assessable income for the year in which the cash is received under subsection 6-5(2).

### **Shortfall penalty and shortfall interest charge**

62. Division 284 of Schedule 1 to the TAA sets out the uniform administrative penalties that apply to entities for failing to satisfy obligations under taxation laws.

63. Subsection 284-75(1) of Schedule 1 to the TAA imposes penalties for false or misleading statements according to an entity's behaviour and actions at the time of and leading up to the making of a statement. Where the entity has taken reasonable care to comply with their tax obligations, subsection 284-75(5) of Schedule 1 to the TAA provides that no administrative penalty will be imposed under subsection 284-75(1) of Schedule 1 to the TAA .

64. Where a participant's assessment of an earlier income year is amended to include a discount in relation to Rights ultimately satisfied in ANZ shares no shortfall penalty will be imposed as, at the time of lodgment of the original income tax return, the statement made is not false or misleading.

65. Section 280-100 of Schedule 1 to the TAA imposes SIC on the additional amount of tax that becomes payable as a result of a taxpayer's assessment being amended. This is to compensate the government for the impact of late payments and to ensure that taxpayers with tax shortfalls do not receive an advantage over those who pay the tax properly owing at the appropriate time.

66. The Explanatory Memorandum, which inserted Division 83A into the ITAA 1997, contemplates SIC applying as stated in the following paragraph:

1.372 The shortfall interest charge may apply in situations where the Commissioner amends an employee's income tax assessment for an earlier income year to include additional amounts of assessable income that result in extra income tax becoming payable.

67. Section 280-160 of Schedule 1 to the TAA provides that SIC may be remitted in full or in part where it is considered to be fair and reasonable to do so.

68. A participant whose assessment of an earlier income year is amended to include an amount in relation to the Rights, and who has SIC imposed on the additional amount of tax that becomes payable, may request that the Commissioner exercise his discretion under section 280-160 of Schedule 1 to the TAA and remit the SIC in full or in part.

## **Appendix 2 – Detailed contents list**

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Subject references:*

- employee share schemes

*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1997 6-5
- ITAA 1997 6-5(2)
- ITAA 1997 Div 83A
- ITAA 1997 83A-10
- ITAA 1997 83A-10(1)
- ITAA 1997 Subdiv 83A-B
- ITAA 1997 83A-25(1)
- ITAA 1997 Subdiv 83A-C
- ITAA 1997 83A-105(1)
- ITAA 1997 83A-105(3)
- ITAA 1997 83A-110
- ITAA 1997 83A-110(1)

- ITAA 1997 83A-120
- ITAA 1997 83A-120(3)
- ITAA 1997 83A-120(4)
- ITAA 1997 83A-120(5)
- ITAA 1997 83A-120(6)
- ITAA 1997 83A-120(7)
- ITAA 1997 83A-330
- ITAA 1997 83A-340
- FBTAA 1986 136(1)(f)
- TAA 1953
- TAA 1953 Sch 1 280-100
- TAA 1953 Sch 1 280-160
- TAA 1953 Sch 1 Div 284
- TAA 1953 Sch 1 Subdiv 284-B
- TAA 1953 Sch 1 284-75(1)
- TAA 1953 Sch 1 284-75(5)
- Copyright Act 1968

*Other references:*

- Explanatory Memorandum to the Tax Laws Amendment (2009 Budget Measures No. 2) Bill 2009

ATO references

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